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No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

JOHN HENAO-OSPINA and MARTHA GUTIERREZ-BARRANCO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT BLOSSNER
Attorney for Petitioner
Henao-Ospina
233 Broadway
New York, New York 10279
(212) 571-0805

DAVID SEGAL
Attorney for Petitioner
Gutierrez-Barranco
Eleven Broadway
New York, New York 10004
(212) 943-5668

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15 pp

QUESTIONS PRESENTED

1. Should the cocaine have been suppressed because no valid consent to search was given by petitioner Gutierrez?

2. Was the consent given by petitioner Gutierrez invalid because it was the product of an unlawful detention?

3. Even if petitioner Gutierrez gave a valid consent to search, did it extend to the contents of the basement apartment occupied by petitioner Ospina?

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No.

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JOHN HENAO-OSPINA and MARTHA GUTIERREZ-BARRANCO,

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vs.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, The Chief Justice, and Associate Justices of the Supreme Court of the United States:

Petitioners John Henao-Ospina and Martha Gutierrez-Barranco respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, rendered on November 28, 1988, which affirmed the convictions of petitioners Henao-Ospina and Gutierrez-Barranco

for conspiring to distribute cocaine and possession of cocaine with intent to distribute, in violation of 21 U.S.C. §§ 846, 841(b)(1)(A), 841(a)(1).

OPINION BELOW

After indictment, petitioners pleaded not guilty and requested suppression of the cocaine seized on the grounds that the seizure of that evidence stemmed from violations of their constitutional rights. A hearing was conducted after which the motion to suppress was denied in an oral opinion issued from the bench. Petitioners were tried without a jury and convicted.

The judgment of conviction was affirmed by the order of the United States Court of Appeals for the Second Circuit in an order filed on November 28, 1988.

The opinion of the Court of Appeals was not officially reported. The summary order issued by the court is made a part hereof and is set forth in the appendix.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on November 28, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved in the case at bar is the Fourth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The petitioners, after having been indicted, moved to suppress

the cocaine seized on the grounds that it was seized in violation of their Fourth Amendment rights, and after the District Court denied that motion following a hearing, were convicted after trial without a jury of conspiring to distribute cocaine and of possessing cocaine with intent to distribute. On June 14, 1988 each petitioner was sentenced to a term of imprisonment of one hundred and fifty-one (151) months.

The testimony at the hearing on the motion to suppress, established that six law enforcement officers went to a house in Fresh Meadows, Queens, New York, investigating a homicide. Once inside, and after it was learned that none of the occupants, including petitioners and one other young woman, knew anything about the homicide, petitioner Gutierrez was separated from the others in the kitchen where she agreed to a search of the house.

In a bedroom apartment — a room occupied by petitioner Ospina as evidenced by the retrieval of his passport from it — the cocaine was discovered in a number of plastic garbage bags. No effort was ever made to obtain a consent to search from petitioner Ospina. Both petitioners were placed under arrest.

REASONS FOR GRANTING THE WRIT

I.

THE COCAINE SHOULD HAVE BEEN SUPPRESSED BECAUSE NO VALID CONSENT WAS EVER GIVEN BY PETITIONER GUTIERREZ.

In the case at bar, this Court is confronted with a Court of Appeals decision of the Second Circuit which is clearly in conflict with the import of prior decisions of this Court. It is now axiomatic that "Consent to search is voluntary when it is a true act of the will, an unequivocal product of an essentially free and unconstrained choice. Voluntariness is incompatible with official coercion, actual or implicit, overt or subtle". *See, e.g., Schneckloth v. Bustamonte,* 412 U.S. 218, 225-228, *supra.* "Where there is coercion there cannot be consent". *Bumper v. North Carolina,* 391 U.S. 543.

Here rather than Gutierrez' alleged consent being the "true act of the will," it is abundantly clear that she was acting out of fear. A total of six agents entered the residence, at least three of them walking in after the first three were apparently granted permission. Gutierrez after being interrogated about a murder she knew nothing about, was then separated from her friends and asked to sign a consent to search, which she did.

These factors as well as others developed at the hearing clearly establish the lack of a valid consent.

II.

THE CONSENT GIVEN BY PETITIONER GUTIERREZ WAS THE PRODUCT OF AN UNLAWFUL DETENTION.

The testimony adduced at the hearing clearly established that petitioner Gutierrez was never free to leave the premises after the agents had entered. At all times leading up to her signing of the consent form, six agents remained in the house at close proximity.

The circumstances presented were different from those presented in *INS v. Delgado,* 466 U.S. 210 (1984), despite the Court of Appeals' reasoning. This was not a factory setting in which a person might more readily accept an "interruption" by law enforcement agents — but a home. Rather than remain with co-workers, Gutierrez was separated physically and visually from her friends. The circumstances presented were clearly of such an intimidating nature as to suggest to Gutierrez that she was *not* free to leave.

III.

THE CONSENT GIVEN BY PETITIONER GUTIERREZ DID NOT EXTEND TO THE BASEMENT APARTMENT OCCUPIED BY PETITIONER OSPINA.

Even if Gutierrez' consent to search was valid, her consent could not logically be found to extend to the basement in which the narcotics were found. When the government seeks to rely upon the consent of a co-tenant to justify a warrantless search of premises, it must prove not only that consent was freely and voluntarily given (*see Schneckloth v. Bustamonte,* 412 U.S. 218, 222, 93 S. Ct. 2041, 2045, 36 L. Ed. 2d 854), but that the consenting person "possessed common authority over" or had

"other sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock,* 415 U.S. 164, 171, 94 S. Ct. 2041, 2045, 36 L. Ed. 2d 242 (1974); *United States v. Buettner-Janusch,* 646 F.2d 759, 764 (2nd Cir.), *cert. denied,* 454 U.S. 830, 102 S. Ct. 126, 70 L. Ed. 107 (1981); *United States v. Orejuela-Guevary,* 659 F. Supp. 882 (E.D.N.Y. 1987).

Here, the facts established at the hearing prove the agents clearly knew before they began their search that Gutierrez did *not* have "common authority over the basement bedroom and that it was in all likelihood Ospina's room. Thus, his consent was needed before any search would be legally permissible.

Since the case at bar presents this Court with a case in which the United States Court of Appeals for the Second Circuit has decided a federal constitutional question in a way which conflicts with the applicable decisions of this Court the petition should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID SEGAL
Attorney for Petitioner
Gutierrez-Barranco

ROBERT BLOSSNER
Attorney for Petitioner
Henao-Ospina

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED NOVEMBER 28, 1988

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of November, one thousand nine hundred and ninety-nine.

PRESENT:

HONORABLE WILLIAM H. TIMBERS,
HONORABLE LAWRENCE W. PIERCE,
HONORABLE GEORGE C. PRATT,

Circuit Judges,

88-1263
88-1264

UNITED STATES OF AMERICA,

Appellee,

-v-

JOHN HENAO-OSPINA and MARTHA GUTIERREZ-BARRANCO,

Defendants-Appellants.

ORDER

Appendix A

John Henao-Ospina and Martha Gutierrez-Barranco appeal from judgments of the United States District Court for the Eastern District of New York, Sifton, *J.*, convicting them of conspiring to distribute cocaine and of possessing cocaine with intent to distribute.

1. Appellants contend that the search by the law enforcement officers which resulted in the discovery of the cocaine was illegal and therefore the evidence of the cocaine should have been suppressed. First, they argue that Gutierrez-Barranco's consent to the search was invalid because it was not freely given. Whether consent has been freely given is a question of fact. *United States v. Puglisi,* 790 F.2d 240, 243 (2d Cir.), *cert. denied,* 107 S. Ct. 106 (1986). Thus, a reviewing court should only overturn a finding that consent was freely given if that finding is clearly erroneous. *See* Fed. R. Civ. P. 52(a). Moreover, in reviewing a denial of a motion to suppress, the appeals court should view the evidence in the light most favorable to the government. *United States v. Isom,* 588 F.2d 858, 861 (2d Cir. 1978). Here, the record supports the district court's finding that the consent was freely given. There is evidence that at no time before Gutierrez-Barranco consented to the search did the officers draw their weapons or overtly threaten the inhabitants of the house. Further, there is evidence that the officers who did not participate in the interview of the inhabitants remained unobtrusively near the entrance to the house. We conclude that the district court did not clearly err in finding that Gutierrez-Barranco freely consented to the search.

2. Next, appellants argue that Gutierrez-Barranco's consent was invalid because the officers unlawfully detained her. In *INS v. Delgado,* 466 U.S. 210 (1984), the Supreme Court held that a group of factory workers had not been seized when INS agents entered the factory, and, while some agents remained at the exits,

others questioned the workers. The Court wrote that, "(u)nless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment." *Id.* at 216. The Court added that "police questioning, by itself, is unlikely to result in a Fourth Amendment violation." *Id.* Here, the circumstances are similar to those in *Delgado*. There is evidence that the officers entered the house, and, while some remained at the entrance, others interviewed the inhabitants. Based upon these circumstances, we conclude that the district court did not clearly err in its determination that Gutierrez-Barranco was not unlawfully detained.

3. Finally, appellants contend that even if Gutierrez-Barranco's consent to the search was valid in general, the consent did not give the officers the right to search the contents of the bags and boxes in the basement bedroom. We conclude that, since it was not established that the bedroom in the basement was Henao-Ospina's, there is no basis for the conclusion that Gutierrez-Barranco lacked the authority to consent to the search of the containers in that bedroom.

The judgments of the district court are AFFIRMED.

s/ Wm. H. Timbers
HONORABLE WILLIAM H. TIMBERS,

s/ L. W. Pierce
HONORABLE LAWRENCE W. PIERCE,

Appendix A

s/ George C. Pratt
HONORABLE GEORGE C. PRATT,

Circuit Judges.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.